Dr R Ramachandran; ex p Ganeswary a/p Ponnudurai

HIGH COURT (SHAH ALAM) — BANKRUPTCY NO MT1-29-2821 OF 1997
SURIYADI J
4 OCTOBER 2002

Bankruptcy *— Notice — Validity of — Notice had its source from a combined sum of three separate orders — Whether bad in law — Bankruptcy Act 1967 s 3(1)(i) — Bankruptcy Rules 1969 O 91(2)*

The judgment creditor had served a bankruptcy notice against the judgment debtor. The source of the bankruptcy notice had stemmed from an alleged flawed allocatur emanating from a civil suit. The judgment debtor had alleged that the gross sum of the above mentioned allocatur had its source from the combined sum of three entirely separate orders. The judgment debtor thereupon took up the issue and applied to set aside that impugned notice. The deputy registrar had heard it and had eventually rejected it. Being dissatisfied, the debtor had filed an appeal to the judge in chambers.

Held, allowing the appeal:
The bankruptcy notice had contravened s 3(1)(i) of the Bankruptcy Act 1967 in that two final judgments or orders had been its basis as per the allocatur, thus also contravening O 91(2) of the Bankruptcy Rules 1969. A creditor is entitled to apply for the issuance of a bankruptcy notice against a debtor, subject only to one final judgment or order. Any bankruptcy notice based on more than one final judgment or order will vitiate any bankruptcy proceeding (see p 89H–I).

[**Bahasa Malaysia summary**

Pemiutang kehakiman telah menyampaikan notis kebankrapan ke atas penghutang kehakiman. Notis kebankrapan tersebut berpunca daripada alokatur yang cacat daripada suatu guaman sivil. Penghutang kehakiman telah menyatakan bahawa jumlah kasar daripada alokatur tersebut berpunca daripada jumlah tiga perintah yang berlainan. Penghutang kehakiman telah memberi perhatian kepada isu tersebut dan telah memohon untuk mengenepikan notis tersebut. Timbalan pendaftar telah mendengar permohonan tersebut dan telah menolaknya. Penghutang tidak berpuas hati dan telah merayu kepada hakim di dalam kamar.

Diputuskan, membenarkan rayuan:
Notis kebankrapan tersebut telah melanggar s 3(1)(i) Akta Kebankrapan 1967, di mana dua penghakiman muktamad atau perintah telah menjadi dasar alokatur tersebut, dan dengan itu juga telah melanggar A 91(2) Kaedah-kaedah Kebankrapan 1969. Seorang

A pemiutang berhak memohon untuk pengeluaran notis kebankrapan terhadap seorang penghutang, tertakluk kepada satu penghakiman muktamad atau perintah. Sebarang notis kebankrapan yang berdasarkan lebih daripada satu penghakiman atau perintah akan membatalkan sebarang prosiding kebankrapan (lihat ms 89H–I)].

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Notes

For cases on the validity of a bankruptcy notice, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue), paras 1791–1813.

C

Cases referred to

Chen Chong Fatt Willy, Re, ex parte Hitachi Lease (Singapore) Pte Ltd [1987] 1 MLJ 94 (refd)

Chop Sin Guan Seng, Re [1934] MLJ 1 (refd)

Haroun Al-Rashid bin Mohd Yusof, Re, ex p Daya Leasing Sdn Bhd [1996] 5 MLJ 317 (refd)

D

J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd [2000] 3 MLJ 177 (refd)

Khaw Siew Suan, Re; ex parte Asia Commercial Finance (M) Bhd [2001] 1 MLJ 101 (refd)

Khoo Kay Hoe (trustees of the estate of Oh Kee Lee @ Oh Phaik Sim, deceased) v Chor Phaik Har and another appeal (1999) 3 MLJ 124 (refd)

E

Lim Kim Guan, Re, ex p Four Seas Bank Ltd [1991] 1 MLJ 330 (refd)

Low Mun v Chung Khiaw Bank Ltd [1988] 1 MLJ 263 (refd)

Michael Chong Ngian Fong v Syarikat Fong Sam Timber & Anor [1977] 1 MLJ 263 (refd)

F

Ong Ah Kooi v Public Finance [1992] 1 CLJ 177 (refd)

Peninsular Land Development Sdn Bhd v K Ahmad (No 2) [1970] 1 MLJ 253 (refd)

Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30 (refd)

G

Legislation referred to

Bankruptcy Act 1967 ss 3, (1)(i), (2)(ii), 131

Bankruptcy Rules 1969 O 91(2)

H *Ram Karpal Singh* (*Karpal Singh & Co*) for the plaintiff/judgment debtor.
K Periasamy (*Peri*) for the respondent/judgment creditor.

Suriyadi J: A bankruptcy notice dated 15 November 1997 had been served against one Dr R Ramachandran ('the judgment debtor'), by one Ganeswary a/p Ponnudurai ('the judgment creditor') for the sum of

I RM35,547.50 with interest of RM1,478.50 calculated from 1 April 1997 until 15 October 1997. The source of that bankruptcy notice had stemmed from an alleged flawed allocatur emanating from Kes Sivil D1–28–16–92.

The bone of contention materialized on the filing day of the bankruptcy notice by the debtor on 12 December 1967, pursuant to s 3(2)(ii) of the Bankruptcy Act 1967, disputing its validity. It is trite that a bankruptcy notice is to alert a debtor of the sum he has to pay as denoted in the document, founded on a final judgment or order against the debtor, in order to avoid bankruptcy. On the other hand, if the bankruptcy notice were to be declared invalid, then naturally any subsequent proceeding, in particular the petition would be null and void (*Re Khaw Siew Suan; ex parte Asia Commercial Finance (M) Bhd* [2001] 1 MLJ 101).

The judgment debtor here had alleged that the gross sum of the abovementioned allocatur had its source from the combined sum of three entirely separate orders. And this flawed allocatur, pursuant to O 59 r 33 of the Rules of the High Court 1980, was the very source of the bankruptcy notice. The judgment debtor thereupon took up the issue and applied to set aside that impugned notice. The deputy registrar had heard it eventually on 3 September 1998 and had eventually rejected it. Being dissatisfied, the debtor had filed an appeal to the judge in chambers, and after hearing it, I had allowed the appeal with costs. I now supply my reasons for that decision.

It is quite normal that a presiding judge may not quantify costs in a final order *insitu*, save in the thought that the matter will be resolved later, by the senior assistant registrar vide the allocatur. The latter, bearing the results of the taxation of a final order, may certainly be adverted to as the basis of any bankruptcy proceeding (*Low Mun v Chung Khiaw Bank Ltd* [1988] 1 MLJ 263). Abdul Malek Ahmad JCA (as his Lordship then was) in *Khoo Kay Hoe (trustees of the estate of Oh Kee Lee @ Oh Phaik Sim, deceased) v Chor Phaik Har and another appeal* [1999] 3 MLJ 124 had occasion to state at p 132:

> In essence the allocatur merges with the order for cost. ...
>
> Would not they be liable to pay the costs stated in the allocatur? We hold that they would be and this attempt to say that bankruptcy proceedings cannot be based on an allocatur when no steps had been taken to set them aside merely denotes that if we were to agree with this technicality, the respondent would not have any recourse at all to recover the costs against the appellants despite the final judgment or order. This would render the final judgment or order meaningless.

Why then my rejection of the bankruptcy notice based on the current allocatur? I had taken that course of action as I had found that impugned bankruptcy notice wanting, it being founded, inter alia, on an allocatur, which had subsisted on more than one final judgment or order. It thus had contravened the requirements of bankruptcy law. Statutorily, it is established law that a creditor is not entitled to apply for the issuance of a bankruptcy notice by combining two or more final judgments or final orders, be they from the same suit or not. Rule 91(2) of the Bankruptcy Rules 1969 promulgates as follows:

> A creditor is not entitled to apply for the issue of a bankruptcy notice by combining two or more final judgments or final orders.

The court in *Re Chen Chong Fatt Willy; ex parte Hitachi Lease (Singapore) Pte Ltd* [1987] 1 MLJ 94, in clear terms had opined at p 94:

> It is well accepted that a bankruptcy petition cannot be founded on two separate judgments even though it may be obtained in the same suit. ...
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> In this particular case I had held that there were two judgments although they were in the same suit, one a consent judgment dated June 24, 1985 for $2,000/- and the other a contested judgment dated July 8, 1985 for $24,676.78. *Execution on these two judgments would have to be levied separately* ... (Emphasis added.)

In the current case, the facts revealed that the allocatur's source was:

(i) an ex parte order dated 11 January 1992 (PG 1);

(ii) an ex parte order for 'stay' dated 11 January 1992 (PG 2); and

(iii) an inter parte order dated 12 November 1992 (PG 3).

The pertinent question which had been bandied around during the hearing, and which required immediate attention by me was their status. Were the above judgments or orders final or otherwise? It is trite law that a judgment or order is final if it disposes of the rights of the parties finally, or if no further step is necessary to perfect it (*Ong Ah Kooi v Public Finance* [1992] 1 CLJ 177; *The Law and Practice of Bankruptcy in Malaysia* by Khoo Kay Ping). In *Peninsular Land Development Sdn Bhd v K Ahmad (No 2)* [1970] 1 MLJ 253, Azmi LP had occasion to remark at p 254:

> In *Bozson v Altrincham Urban District Council* [1903] 1 KB 547, Lord Alverstone CJ laid down the test as follows:
>
> 'It seems to me that the real test for determining this question ought to be this: *Does the judgment or order, as made, finally dispose of the right of the parties? If it does, then I think it ought to be treated as a final order,* but if it does not, it is then, in my opinion, an interlocutory order.'
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> There would appear to be therefore, a difference of opinion on this question, which may be put again this way. The first view is that an order is interlocutory unless it is made on an application of such a character that whatever order had been made thereon must finally have disposed of the matter in dispute. The other test as expressed by Lord Alverstone CJ is to look at the order made. *If it had disposed of the rights of the parties then that it is final.* In *Ratnam v Cumarasamy & Anor* [1962] MLJ 330 the Malayan Court of Appeal ... applied the test enunciated by Lord Alverstone ... . With *deepest respect I would apply the same test* ... (Emphasis added.)

Khoo Kay Ping at p 25 had summarized the situation succinctly by authoring that:

> A judgment or order is final if it disposes of the rights of the parties finally or if no further step is necessary to perfect it. If it does, it does not matter whether the judgment or order is reached after a full trial. A summary judgment is hence a final judgment irrespective of whether the defence had filed defence and counterclaim, or an appeal has been filed against the judgment ... . Similarly a consent judgment or order may support the issuance of a bankruptcy notice.

Before scrutinizing and deciding whether the three orders were final or not, I had to resolve at the outset the question of what PG1 had to do with the debtor regardless of its status. Let us now peruse PG1. This order, which beyond doubt was a final one, came about after the judgment creditor had successfully obtained an injunction against a company called Prismatic Sdn Bhd. The latter was also ordered to pay costs to the creditor. After the injunction order was pronounced, the judgment debtor of this current case, ie Dr R Ramachandran, as a shareholder cum managing director of Prismatic, had applied for a stay of that injunction. He was successful but costs were put on hold (reserved). That successful stay order was marked PG2. Later, the judgment debtor took the action a step further by going to court to set aside the injunction order (PG1). Unfortunately, his application was dismissed. PG3 was that culminating order that dismissed the debtor's application to set aside PG1.

Returning to PG1, it was indisputable that it was made against Prismatic, a company that had been incorporated in Malaysia, and in law a separate entity. That being so, an order for costs meant to be the liability of another person, could not be the responsibility of a person not adjudged to assume responsibility, in this case the current judgment debtor. Why crucify him for the debts of others as reflected in the bankruptcy notice? Here, there was nothing in PG1, ie the first final order that directed the judgment debtor to assume liability, despite having been added as an intervener. In *J Raju all M Kerpaya v Commerce International Merchant Bankers Bhd* [2000] 3 MLJ 177, the Court of Appeal had remarked at p 189:

> ... it is a condition precedent to the exercise of bankruptcy jurisdiction that a bankruptcy notice shall require a debtor to pay the judgment debt in accordance with the terms of the judgment on which it is founded.

To clarify, and to take the matter a step further, in *Re Chop Sin Guan Seng* [1934] MLJ 1, the court there had viewed at p 1 that:

> The whole law of bankruptcy is personal.
>
> There must be a debtor and the act of bankruptcy relied on must be his personal act.

Without more, that singular error could have been more than ample to vitiate the notice, and thereupon permit me to allow the appeal with costs, but as the appellant had painstakingly ventilated some other interesting reasons, I find it necessary to comment on them.

Is PG2 a final order, bearing in mind that the court had ordered the costs to be reserved? After considering the totality of the facts, I was satisfied that it must be answered in the negative. This issue is quite analogous to a situation where the interest rate has yet to be fixed in a judgment but dependant on a fluctuating rate (see the differing views of *Re Lim Kim Guan, ex p Four Seas Bank Ltd* [1991] 1 MLJ 330 and *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30).

In the latter case, the Federal Court had held that such a judgment could not support a bankruptcy notice, as it would depend on a fluctuating rate, which would be subject to the discretion of the plaintiff. How could

A the latter case not be relevant for the current poser when despite interest having been allowed except for the finalizing of the rate, the judgment could still not support a bankruptcy notice. If such a 'minor' matter was fatal to a bankruptcy proceeding, then it follows to reason that any substantive matter still left unresolved must surely disqualify any judgment as a final order.

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In the current case, it was not a mere question of the senior assistant registrar being unable to quantify mathematically the eventual amount, but the question of whether costs ought to be granted at all. The fact that it was reserved and had been put on hold, with the initial pronouncing court yet to apply its mind on it merely confirms its incompleteness. Thus costs,
C inevitably one of the contentious prayers in any action, was still at large here (*Re Haroun Al-Rashid bin Mohd Yusof, ex p Daya Leasing Sdn Bhd* [1996] 5 MLJ 317).

Following the above reasoning, as the issue of costs had yet to be resolved and factored by the court, I failed to conclude that it (PG2) was a
D final judgment or order.

As costs was part of the bankruptcy notice here, and as PG2 was not a final order, it certainly could not withstand the scrutiny and challenge posed by the debtor. If PG2 had been a final order, and it being the solitary basis of a bankruptcy notice, but without taking into account costs that was yet to be quantified, in all certainty, that notice would have been good.
E Mohamed Azmi SCJ in *Low Mun v Chung Khiaw Bank Ltd* had occasion to remark at p 266:

> As regards costs, where a judgment is obtained for a certain sum and costs to be taxed, a bankruptcy notice can be issued for the amount of the judgment without the costs ... . The costs cannot be included or separately relied on
F until they have been taxed ... .

Apart from the judgment against Prismatic, which was a separate entity vis-a-vis the judgment debtor, together with a judgment that was interlocutory in nature, the 'rojak' based bankruptcy notice also had roped in the registrar's certificate that dealt with the costs meted in PG3. The latter,
G satisfactorily was a final order, which on its own could have qualified to support the judgment creditor's case, but not supportive in the circumstances of the case.

To regurgitate, at the end of the day, I had found the bankruptcy notice as flawed as:

H (i) the first apparent error of the bankruptcy notice was that it had contravened s 3(1)(i) of the Bankruptcy Act 1967, in that two final judgments or orders had been its basis as per the allocatur, thus also contravening O 91(2) of the Bankruptcy Rules 1969. As the above order is unambiguous, it goes without saying that a creditor is entitled to apply for the issuance of a bankruptcy notice against a debtor,
I subject only to one final judgment or order. Any bankruptcy notice based on more than one final judgment or order will vitiate any bankruptcy proceeding;

(ii) the second error was that one of the two final orders was never directed against the debtor but against a company called Prismatic. The judgment debtor could never be held liable as he never was adjudged to be responsible for the costs;

(iii) the third error was that PG2, which was not a final order, could never have qualified and should not have been the basis of the impugned bankruptcy notice via the allocatur; and

(iv) lastly, the error was compounded when PG1 and PG3 were lumped together with PG2 in the allocatur, akin to an unholy matrimony, to support the bankruptcy notice.

No amount of submission could convince me that the above defects were mere irregularities, which could be cured and validated by s 131 of the Bankruptcy Act (*Michael Chong Ngian Fong v Syarikat Fong Sam Timber & Anor* [1977] 1 MLJ 263). Thus, based on the combined flaws that were fundamental and serious, I had no hesitation in allowing the appeal with costs, and had accordingly set aside the bankruptcy notice.

Appeal allowed.

Reported by Peter Ling